85-1499

No. _____

Supreme Court, U.S.
FILED
MAR 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Petitioner

v.

CITY OF CAPE CORAL
Respondent

WRIT OF PETITION OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

EDWARD DEV. BUNN
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
(703) 684-2500

Attorney for Petitioner

Questions Presented For Review

I. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl, Brown & Weed Associates, Inc. to engage in construction under validly issued building permits in which Landahl, Brown & Weed Associates, Inc. had expended $266,000, effected a taking for which the Fifth Amendment requires the payment of money damages to compensate for such taking.

II. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl, Brown & Weed Associates, Inc. to engage in construction under validly issued building permits in which Landahl, Brown & Weed Associates, Inc. had expended $266,000, engaged in an invalid exercise of the police power in violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983.

List of Parties and Affiliates

A list of all parties to this proceeding are contained in the caption.

Landahl, Brown & Weed Associates, Inc. is not and has no parent subsidiary or affiliated company or organization.

Table of Contents

	Page
Questions Presented For Review	2
List of Parties and Affiliates	2
Opinions Below	5
Jurisdictional Grounds	5
Constitutional and Statutory Provisions Involved	5-6
Statement of the Case	7
Argument	10-13
Conclusion	14
Appendix	
Decision of the Supreme Court of Florida	A-1
Decision of the Second District Court of Appeal, Denying Rehearing	B-1
Opinion of the Second District Court of Appeal	C-1
Trial Court Final Judgment	D-1

Table of Authorities

Constitutional Provisions

U.S. Constitution, Amend. V 5
U.S. Constitution, Amend. XIV 6

Statutory Provision

42 U.S.C. § 1983 ..... 6, 13

Cases

Agins v. *City of Tiburon*, 447 U.S. 255 (1980) 11, 12
Barbian v. *Panagis*, 694 F.2d 476 (7th Cir. 1982) 12, 13
Citadel Corp. v. *Puerto Rico Highway Authority*, 695 F.2d 31 (1st Cir. 1982) 12, 13
Memphis Light, Gas & Water Div. v. *Craft*, 436 U.S. 1 (1978) 11, 12, 13
Nectow v. *Cambridge*, 277 U.S. 183 (1928) 12
154 East Park Ave. Corp. v. *City of Long Beach*, 350 N.Y.S.2d 974, 374 N.Y.S.2d 569, 438 N.Y.S.2d 288 (1981) 11
Penn Central Transit Co. v. *New York City*, 438 U.S. 104 (1978) 12
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) ... 12
San Diego Gas & Electric Co. v. *San Diego*, 450 U.S. 621 (1981) 11, 12
Town of Largo v. *Imperial Homes Corp.*, 304 So.2d 571 (Fla. 2d DCA 1975) 11
Williamson Planning Comm'n v. *Hamilton Bank*, 473 U.S. ____ (1985). 10, 12, 13

Other Authorities

49 A.L.R. 3d 13 11

Opinions Below

The opinion of the Supreme Court of Florida, declining to accept jurisdiction, is not officially reported, and is reproduced at App. A.

The opinion of the Second District Court of Appeal of Florida is reported at 470 So.2d 25 (2nd DCA 1985). The opinion is reproduced at App. B.

Jurisdictional Grounds

The decision of the Second District Court of Appeal of Florida was rendered on May 8, 1985, and provided that it was not final until the time expired to file a rehearing motion, and if filed, determined. A motion for rehearing was filed, and denied on June 7, 1985.

The decision of the Supreme Court of Florida declining to accept jurisdiction was rendered and entered December 10, 1985.

This petition for writ of certiorari was filed within 90 days of the entry of the December 10, 1985 decision of the Supreme Court of Florida. Jurisdiction of this Court is based upon 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

Constitutional Provisions

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1, to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

In early 1974 Landahl, Brown & Weed Associates, Inc. ("Landahl") purchased a building site in the City of Cape Coral zoned for multi-unit high rise construction. Following that purchase, he purchased six additional building sites in the City and began plans to build seven multi-unit high rise buildings on the seven sites in accordance with the then zoning of the property sites. In early 1975, Landahl obtained building permits for each of the seven sites from the City of Cape Coral to build the high rise buildings. After the permits were issued to Landahl, the City's building code was amended to prevent high rise buildings from being built in the City. Landahl's buildings aroused substantial public interest. During the construction by Landahl of the buildings, the City posted notice on each of the seven construction sites that construction was to terminate. The factual situation is slightly different for each of the sites, but it is correct to state, that at the time, the City stated it was stopping construction as sufficient construction had not begun under the permits within the time allowed for construction to start. However, the evidence was uncontroverted that as to two sites the date for construction to start had not arrived when construction was stopped by the City, and in regard to the other five sites the evidence centered around whether Landahl had engaged in sufficient construction such as to be called the actual start of construction.

The uncontroverted trial evidence was that Landahl had, *inter alia*, expended in cash $266,000 for construction at the time construction was stopped. The trial evidence was that the City revoked the building permits to prevent Landahl from completing the buildings pursuant to the permits issued under the old Code before it was amended in April 1975. After the permits were revoked, the City refused to allow construction to continue, although the City Code (Section 103.2) provides that if work is stopped on a building, the reason therefore shall be stated and an opportunity given to correct the problem for construction to commence again.

After the City continued to refuse to permit Landahl to engage in construction under the permits it had issued, Landahl filed an action alleging, *inter alia*, in the complaint:[1]

COUNT II
(VIOLATION OF CONSTITUTIONAL RIGHTS)

* * *

23. That in revoking the building permits issued to . . . (Landahl), . . . for the seven multi-unit, high-rise buildings in the City of Cape Coral, the (City) . . . failed to give the third party plaintiff notice of its actions and an opportunity to be heard in violation of due process, failed to provide or pay just compensation for the taking of private property, the property being taken and the permits being revoked by the arbitrary, capricious and malicious acts of the (City) . . . without just or proper cause or reason, and did interfere with the contract, agreement and arrangement between (Landahl) . . . and the City of Cape Coral evidenced by the building permits which had been issued by the City . . .

* * *

COUNT IV
(VIOLATION OF CIVIL RIGHTS)

* * *

27. That in revoking the building permits issued to (Landahl) . . . for the seven multi-unit high-rise buildings in the City of Cape Coral, the (City) . . . did violae 42 U.S.C. § 1983, 1985 in that they conspired to deprive the (Landahl) . . . of equal protection of the laws and of equal privileges and immunities.

---

1. The pleading was a third party complaint; Landahl had been sued by its contractor and Landahl brought the City into the action by third party complaint.

The Landahl action requested $10,000,000 in damages against the City. At the trial, the presiding judge ruled that Landahl could not introduce evidence of any loss except that of actual dollars expended. In particular, it could not recover the loss of profits. The Landahl evidence showed $266,000 in actual dollars expended, and the jury returned a verdict for the exact amount admitted into evidence. The case was not tried until 1984 and by that time Landahl had lost the land for the seven sites by forclosure, and all of its assets were invested in the seven buildings. Equitable relief, even if granted within 90 days of the stopping of construction, would not have benefited Landahl, especially in view of the 1975 economy.

The trial judge was of the opinion that Landahl could recover money damages against the City for the wrongful revocation of the building permits, and so instructed the jury. The jury returned a quick verdict for Landahl for exactly the amount the Court permitted Landahl to introduce into evidence as damages.

The City appealed the judgment to the Second District Court of Appeal of Florida, alleging procedural issues.[2] That Court, *sua sponte*, raised the issue of whether there was a cause of action against a municipality for damages for revoking a building permit, and held that the cause of action was limited to injunctive relief under the doctrine of equitable estoppel. App. C, at page 4. Landahl timely filed a motion for reconsideration which was denied. App. B.

Thereafter, Landahl timely petitioned the Supreme Court of Florida for a writ of certiorari. By decision entered December 10, 1985, the Supreme Court of Florida declined to accept jurisdiction of the case. App. A.

---

2. The issues raised were that the City could not be brought into the action by a third party complaint, and if it could, Landahl's recovery, under the Florida Rules of Civil Procedure, was limited to the amount of the original plaintiff's complaint.

Argument

I. **Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to continue to engage in construction under validly issued building permits in which Landahl had expended $266,000, effected a taking for which the Fifth Amendment requires the payment of money damages to compensate for such taking.**

II. **Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to engage in construction under validly issued building permits in which Landahl had expended $266,000, engaged in an invalid exercise of the police power in violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983.**

The reasons for granting this writ of certiorari are so closely related that they will be dicussed together as one argument.

Although this Court has on several occasions expressed its interest in the question as one justifying the granting of the writ of certiorari, it has never decided the issue of whether a governmental unit in the administration of its regulations may effect a "taking" for which the Fifth Amendment requires the payment of money damages to compensate for such taking. See *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. ____ (1985). The Court also has never decided the issue of whether the revocation of a building permit under facts that constitute a violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983 may require the payment of money damages in lieu of only injunctive relief. The Court, of course, has held under various other factual circumstances that the due process clause may justify money damages.

In the present case, the Trial Court recognized Landahl's right to money damages for wrongful revocation of a building permit, but the Second District Court of Appeals reversed, holding that money damages are not available and only injunction relief may be granted. In fact, however, no Florida case has previously held as its *ratio decidendi* that money damages are not recoverable. The Second District cited *Town of Largo* v. *Imperia Homes Corporation*, 309 So.2d 571 (Fla. 2d DCA 1975) in support of its decision but that case did not hold that money damages were not available, but only that injunctive relief was available.

It is to be remembered that Landahl's permits were revoked in 1975, but the case was not tried until 1984, nine years later. By this time, injunctive relief was tantamount to no relief at all and Landahl had lost the land by foreclosure. Most of Landahl's business activities were devoted to the seven high rise units in Cape Coral, and when the permits were revoked, Landahl lost everything. Equitable relief in Landah's case is no relief at all. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978).

Other States have had results similar to that involving Landahl. Compare *154 East Park Ave. Corp.* v. *City of Long Beach*, 350 N.Y.S.2d 974 (1973) awarding money damages with 374 N.Y.S.2d 569, 438 N.Y.S.2d 288 (1981) denying money damages. State courts have been denying money damage relief in the vast majority of cases where zoning or construction on real estate has been involved. See, for example, cases collected at 49 A.L.R.3d 13. It is submitted that cases denying money damages as a matter of law where equitable relief is unsuited to resolve the matter and where money damages would otherwise be an appropriate remedy are in violation of the Fifth and Fourteenth Amendments.

The Fifth Amendment issue has been before the Court on other occasions: See *Williamson, supra; San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). In each case, after deciding that the issue warranted review by the Court, it was held that the question was not properly before the Court and was premature. It was held that the adminstrative remedies must be final, and they were not.

In *Williamson, supra* this Court stated:

> Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, see *San Diego*, 450 US, at 647-653, 67 L Ed 2d 551, 101 S Ct 1287 (dissenting opinion), and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking the jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision . . . 473 U.S. at ____.

Various Federal Circuits have found different implications and interpretations from the Fifth Amendment line of cases from this Court. The issues are significant and the conflict must be decided by this Court. The groundwork has been laid by the prior decisions. *Williamson, supra, San Diego Gas & Electric Co.* v. *San Diego, supra; Agins* v. *Tiburon, supra; Citadel Corp.* v. *Puerto Rico Highway Authority*, 659 F.2d 31 (1st Cir. 1982), *Barbian* v. *Panagis*, 694 F.2d 476 (7th Cir. 1982).

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), this Court stated that governmental regulations affecting an owner's use of his property may constitute a taking. In *Pennsylvania Coal*, Justice Holmes maintained that "if regulation goes too far, it will be recognized as a taking." 260 U.S. at 415. Moreover, the taking clause was explicitly held applicable to zoning regulations in *Agins* v. *City of Tiburon, supra*, when this Court stated:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138 n. 36, (1978)." 447 U.S. at 260.

This Court has recognized that a violation of 42 U.S.C. § 1983, and a violation of the due process clause justify an award of money damages, especially when equitable remedies are unsuited to resolve the matter. *Memphis Light, Gas & Water Div.* v. *Craft, supra.*

Landahl has obtained a final decision, contrary to previous cases heard by this court. The City issued building permits and then revoked them under a guise, as the jury found. This case is ripe for decision by this Court.

This Court has recognized that a violation of 42 U.S.C. § 1983, and a violation of the due process clause justify an award of money damages, especially when equitable remedies are unsuited to resolve the matter. *Memphis Light, Gas & Water Div.* v. *Craft, supra.*

This Court should grant the writ of certiorari to provide direction and guidance to State courts in allowing money damages where a "taking" has been effected, and the result should be the same regardless of whether the relief is afforded under either the Fifth or Fourteenth Amendments, assuming the "taking" has occurred. The Court should also grant the writ as it will resolve the conflict between the Federal Circuits on the issue. The issue commands the attention of this Court.

The rights of developers are unclear, and the exposure of zoning, building and other governmental regulatory agencies is unknown. This uncertainty in the law and the need for clarification has been recognized by this Court by previously granting writs of certiorari on the question of money damages under the Fifth and Fourteen Amendments. In addition to the conflict in the Federal Courts, persons subject to zoning or holding a license or permit are being incorrectly denied money damages for acts that equate to a "taking." The rights and amount of money involved across the Nation is enormous, and the clarifying hand of this Court is needed.

The questions presented, transcend the particular factual situation and parties in this case. The entire planning scheme of every local government body across the country is being impacted as a result of the division in Federal Circuits. Compare *Citadel Corp.* v. *Puerto Rico Highway Authority, supra*, which held that money damages are not recoverable and only injunctive relif is available with *Hamilton Bank* v. *Williamson Planning Comm'n*, 729 F. 2d 402 (6th Cir. 1984) and *Barbian* v. *Panagis, supra*, which held money damages were recoverable.

Conclusion

It is submitted that the Court should grant Landahl's petition for writ of certiorari.

Edward Dev. Bunn
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
(703) 684-2300

Attorney for Petitioner

Supreme Court of Florida

TUESDAY, DECEMBER 10, 1985

LANDAHL, BROWN & WEED ASSOCIATES, INC.,

Petitioner,

v.

CITY OF CAPE CORAL,

Respondent.

CASE NO. 67,371

District Court of Appeal, Second District No. 84-2240

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. p. 9.330(d).

OVERTON, MCDONALD, EHRLICH and SHAW, J.J., concur

ADKINS, Acting C.J., dissents

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

JUNE 7, 1985

CITY OF CAPE CORAL, a Florida municipal corporation,

Appellant,

v. Case No. 84-2240

LANDAHL, BROWN & WEED ASSOCIATES, INC., a Virginia corporation,

Appellee.

Counsel for appellee having filed a motion for rehearing in the above-styled case, upon consideration, it is ORDERED that said motion is hereby denied.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

CITY OF CAPE CORAL, a Florida municipal corporation,

Appellant,

v. CASE NO. 84-2240

LANDAHL, BROWN & WEED ASSOCIATES, INC., a Virginia corporation,

Appellee.

Opinion filed May 8, 1985.

Appeal from the Circuit Court for Lee County; James R. Thompson, Judge.

Richard V. S. Roosa of Aloia, Dudley, Roosa, Cottrell, Sutton & McIver, Cape Coral, for Appellant.

Edward D. Bunn, Bailey's Crossroads, for Appellee.

CAMPBELL, Judge.

Appellant, City of Cape Coral, appeals a final judgment which awarded damages of $266,254 to appellee, growing out of the allegations of its fourth amended third party complaint. The record we have is pitifully meager and the issues raised on this appeal do not really address the most glaring defects in appellee's attempts to state a viable cause of action against appellant. Nevertheless, we conclude the judgment for appellee must be reversed and, on remand, a judgment for appellant shall be entered. We are, to say the least, appalled that the principles of law that require this result are barely touched on in the briefs or in the record below.[PA-1]

The original action below began as a mechanic's lien action by a contractor against appellee for work performed and materials furnished on a development project that had been undertaken by appellee. The original mechanic's lien complaint sought $7,948.50 in damages for unpaid labor and materials. The development project which appellee was pursuing involved several high rise buildings on sites for which appellant had issued building permits. During the initial phases of construction, it was necessary for appallent to issue several extensions of the building permits. Eventually, the permits were revoked and the project apparently abandoned. No action based on equitable estoppel was ever pursued by appellee in an attempt to salvage the building permits.[PA-2] Apparently, prior to the revocation of the permits, there had been changes in the applicable building code which prevented the development project, at least as originally envisioned. No actions or appeals concerning those building code changes appear to have been pursued.

Petitioner's Annotation

PA-1. Feeling defensive, Landahl would point out that the appeal was filed by the City who selected the issues. Landahl would not raise such issues.

PA-2. The complaint against the City had one separate Count of the complaint entitled "EQUITABLE ESTOPPEL," requesting injunctive relief, but the Second District ignored this. The case was tried on the money damage issue.

In its various third party complaints, appellee joined appellant in the action seeking indemnity for any damages it might owe the mechanic's lien complainant and $10,000,000 in damages for revocation of the building permits and the subsequent failure of the construction project. Ultimately, the mechanic's lien complainant and appellee entered into a joint motion for dismissal of that action leaving only the third party actions against appellant.

The third party action went to jury trial as a result of appellee's fourth amended third party complaint. Appellant field various motions to dismiss directed to the various third party complaints. Finally, after the dismissal of the original mechanic's lien action, appellant filed a motion for a judgment on the pleadings. It was at this point, if not before, that the trial judge should have entered judgment for appelant.

It also appears that a motion to dismiss with prejudice should also have earlier been granted. However, we are not sure, because of the meager record, that the proper grounds were presented to the trial judge to support the motions to dismiss. Be that as it may, on the motion for judgment of the pleadings, it should have been clear that there was a failure to state a proper cause of action against the municipal appellant. Fla.R.Civ.P.1.140(h)(2). Appellant was clearly entitled to a judgment as a matter of law and the motion for judgment on the pleadings should have been granted. *Shay* v. *First Federal of Miami, Inc.*, 429 So.2d 64 (Fla. 3d DCA 1983). Appellee's fourth amended third party complaint attempts to state a cause of action against appellant in some seven counts, none of which will support a claim for damages against this municipal appellant. All of the claims seek damages growing out of the revocation of building permits.

First of all, there is no cause of action for the manner in which a municipality exercises its governmental function of issuing or refusing to issue permits. *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, No. 63,115 (Fla. Apr. 4, 1985)[10 FLW 210]. Thus, those actions of a municipality are immune from an action for damages. That is not to say, however, that a party does not have a right to relief from the wrongful refusal or revocation of a building permit. That cause of action is limited though to an action to acquire or retain the permit on the grounds of equitable estoppel. *Town of Largo* v. *Imperial Homes Corporation*, 309 So.2d 571 (Fla. 2d DCA 1975).

We, therefore, reverse the judgment entered for appellee in the trial court below, remand and direct entry of a judgment for appellant.

OTT, A.C.J., and HALL, J., Concur.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

GILVESY CONSTRUCTION, INC.

Plaintiff

vs. Case No. 75-1907CA

LANDAHL, BROWN & WEED ASSOCIATES, INC., et al.

Defendants

FINAL JUDGMENT

Persuant to the verdict rendered in this action

IT IS ADJUDGED that Landahl, Brown & Weed Associates, Inc. recover from the City of Cape Coral the sum of $266,254.00.

ORDERED at Ft. Myers, Florida on the 14 day of August 1984.

JAMES R. THOMPSON
JUDGE

Supreme Court, U.S.
FILED
APR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LANDAHL, BROWN & WEED ASSOCIATES, INC.,

Petitioner,

v.

CITY OF CAPE CORAL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Florida

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD V. S. ROOSA
ALOIA, DUDLEY, ROOSA, COTTRELL, SUTTON & MCIVER
P.O. Box 535
Cape Coral, Florida 33910
(813) 542-4733

Attorney for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	5
APPENDIX	1a
Order of Trial Court 2/21/86	1a
Order of Trial Court 3/20/86	2a
Notice of Appeal 3/17/86	3a
Petitioner's Brief in Florida Supreme Court	4a

TABLE OF AUTHORITIES

CASES: Page

Agins v. Tiburon, 447 U.S. 255 (1980) 5

Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) 4

Penn Central Transit Co. v. New York City, 438 U.S. 104 (1978) 3

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. ___(1985) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1499

LANDAHL, BROWN & WEED ASSOCIATES, INC.,
Petitioner,

v.

CITY OF CAPE CORAL,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Florida, declining to accept jurisdiction, is not officially reported, and is reproduced at Petitioner's App. A.

The opinion of the Second District Court of Appeal of Florida is reported at 470 So.2d 25 (2nd DCA 1985). The opinion is reproduced at Petitioner's App. C.

Order of Trial Court upon remand is reproduced at Respondents Appendix page 1a.

Order of Trial Court on motion to set aside judgment is reproduced at Respondents Appendix page 2a.

STATEMENT OF THE CASE

Respondent adopts petitioner's Statement of the Case as being substantially correct. Upon remand to the trial court, an order was entered for the respondent, Respondent's Appendix page 1a, and an order denying petitioner's Motion To Set Aside Judgment, Respondent's Appendix page 2a.

Petitioner has filed a "Notice of Appeal", Respondent's Appendix page 3a.

ARGUMENT

I. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to continue to engage in construction under validly issued building permits in which Landahl had expended $266,000, effected a taking for which the Fifth Amendment requires the payment of money damages to compensate for such taking.

II. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to engage in construction under validly issued building permits in which Landahl had expended $266,000, engaged in an invalid exercise of the police power in violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983.

Petitioner in its "Questions Presented For Review" raises issues alleged in the complaint but neither tried

by the Trial Court (appendix page 13a) (Petitioners Brief page 9) nor raised on review with the Appellate Courts (Appendix page 6a and 7a). Possibly petitioner intends to raise such issues in the state courts in its latest appeal of the February 21, 1986 trial court order. (Appendix page 3a)

Petitioner claims that the wrongful revocation of a building permit by officials of a municipality amounts to a taking for which petitioner is entitled to just compensation. The Florida Appellate Court ruled that municipalities are immune from an action for damages as a result of the manner in which they exercise this governmental function. A party has only the right to retain the permit not the right to sue for damages.

Petitioner chose to sue for damages rather than to retain the permit or appeal the official decision. (Petitioners Appendix C page 2) Apparently petitioner sought damages because equitable relief, even if granted within 90 days of the stopping of construction, would not have benefited petitioner, especially in view of the 1975 economy. (Petitioner's Brief page 9) This resort to the courts with its claim for damages (Petitioner's Brief page 8) avoided the municipality's final determination in this matter, and without final action by the municipality, there can be no taking of property.

The official's wrongfully made decision to revoke a building permit may be set aside as a matter of law. Such action cannot, at the option of the permit holder, become a taking.

A taking may be by acquisition, as when one takes possession of another's property, or by regulation when government actions force some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole. *Penn Central Transit Co. v. New York City,* 438 U.S. 104 (1978)

There can be no public benefit realized by the wrongful revocation of a building permit and therefore no justification for compensation from the municipality to the injured party. While a judgment for damages against the individual tortfeasor may be appropriate, equitable relief against a municipality can fully restore an injured party and benefit the public by requiring public officials to comply with the law.

It was not the official actior of the municipality to amend its building code tha was the basis for the civil rights claim of the petitioner, but the wrongful conduct of the city official in revoking the building permit. This wrongful conduct of the individually named defendants (Appendix page 14a) cannot, absent direct involvement, support a claim against the municipality. It is only where the action that is alleged to be unconstitutional, implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by a municipality that there would lie a cause of action against a municipality. *Monell v. New York City Dept. of Soc. Serv.* 436 U.S. 658, 690 (1978)

Petitioner's reliance upon *Williamson Planning Comm'n v. Hamilton Bank* 473 U.S. ___(1985) as providing for money damages is not justified. Hamilton Bank was injured by regulation of its property, petitioner by wrongful act of officials. Hamilton Bank's trial was on the denial of civil rights, petitioner's wrongful revocation of permit and Hamilton Bank's judgment is also against the individual officials involved where petitioner's action is only

against the municipality. This substantial difference between application of a zoning law and wrongful conduct of an official is even stronger in *Agins v. Tiburon* 447 U.S. 255 (1980) where it was found that the regulation did not constitute a taking. Injury to a plaintiff is not the same as taking by the defendant.

CONCLUSION

It is submitted that the writ of certiorari should not issue because the matter is subject to review by the Second District Court of Appeal, Federal issues were not litigated in the Florida courts, the wrongful revocation of a building permit does not constitute a taking of property and, in Florida, municipalities are immune from an action for damages under the circumstances of this case.

RICHARD V. S. ROOSA

ALOIA, DUDLEY, ROOSA, COTTRELL,
SUTTON & MCIVER
P.O. Box 535
Cape Coral, Florida 33910
(813) 542-4733
Attorney for Respondent

APPENDIX

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

CASE NO. 75-1907CA

GILVESY CONSTRUCTION, INC., a Florida corporation
Plaintiff,

vs.

LANDAHL, BROWN & WEED ASSOCIATES, INC., a Virginia corporation, *et al.*,
Defendants.

ORDER

THIS court having previously entered a judgment for LANDAHL, BROWN & WEED ASSOCIATES, INC. against the CITY OF CAPE CORAL and that judgment having been reversed with directions to enter judgment for the CITY OF CAPE CORAL. *(City of Cape Coral v. Landahl, Brown & Weed* 470 So 2d 25 (2nd DCA 1985) Pet. for Rev. denied Fla. Supreme Court Case 67,371 (Dec. 10, 1985)

IT IS ADJUDGED, that judgment is entered for the CITY OF CAPE CORAL and that Third Party Plaintiffs LANDAHL, BROWN and WEED ASSOCIATES, INC. take nothing by this action against the CITY OF CAPE CORAL and that the CITY OF CAPE CORAL go hence without day.

ORDERED at Fort Myers, Florida, on the 21 day of February, 1986.

/s/ James R. Thompson
JAMES R. THOMPSON, Circuit Judge

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

CASE NO. 75-1907CA

GILVESY CONSTRUCTION, INC.,

Plaintiff,

vs.

LANDAHL, BROWN & WEED ASSOCIATES, INC., *et al.*

Defendants.

vs.

CITY OF CAPE CORAL

Third party defendant

ORDER

THIS matter came on for hearing on the motion of Landahl, Brown & Weed Associates, Inc. to set aside the judgment entered by this Court on February 21, 1986 granting final judgment in the case in favor of the City of Cape Coral, after hearing argument of the parties, the Court being of the opinion that the motion should be denied,

IT IS ADJUDGED that the Motion to Set Aside Judgment filed by Landahl, Brown & Weed Associates, Inc. be, and the same is hereby, denied.

ORDERED at Fort Myers, Florida on the 20 day of March 1986.

/s/James R. Thompson
JAMES R. THOMPSON, Circuit Judge

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

CASE NO. 75-1907CA

GILVESY CONSTRUCTION, INC.,

Plaintiff,

vs.

LANDAHL, BROWN & WEED ASSOCIATES, INC.,

Defendant, Appellant

vs.

CITY OF CAPE CORAL

Third part Defendant, Appellee

NOTICE OF APPEAL

NOTICE IS GIVEN that Landahl, Brown & Weed Associates, Inc., defendant, appellant, and third party plaintiff, appeals to the Second District Court of Appeal, the Order of this Court rendered February 21, 1986. The nature of the order is a final order entering judgment in favor of the City of Cape Coral.

Edward DeV. Bunn
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
703-684-2500
Attorney for Landahl, Brown & Weed Associates, Inc., Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was mailed this 17th day of March 1986 to Richard V.S. Roosa, Esq., P.O. Box 535, Cape Coral, Florida 33910.

/s/EDWARD DEV. BUNN
EDWARD DEV. BUNN

BRIEF ON JURISDICTION

SUPREME COURT OF FLORIDA

APPEAL NO. 67,371

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Plaintiff, Petitioner

VS.

CITY OF CAPE CORAL
Defendant, Respondent

APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

Edward DeV. Bunn
P.O. Box 1034
Falls Church
Virginia 22041
703-685-2500
Attorney for Landahl, Brown & Weed Associates, Inc., Plaintiff, Petitioner

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	9a
STATEMENT OF FACTS	9a
SUMMARY OF ARGUMENTS	12a
ISSUES PRESENTED FOR REVIEW	
Whether the Second District Court of Appeal Decision was in express and direct conflict with a decision of another district or of the Supreme Court on the same question of law	
Argument I	14a
Argument II	15a
Argument III	16a
Argument IV	18a
CONCLUSION	20a

TABLE OF CITATIONS

Applegate v. Barnett Bank of Tallahassee, 377 So2d 1150 (Fla 1980) 12a, 14a

Bregar v. Britton, 75 So2d 753 (Fla 1954) 16a

City of Miami v. Albro, 120 So2d 23 (Fla 3rd DCA 1960) 13a, 18a, 20a

Commodore Plaza at Century 21, etc. v. Cohen, 350 So2d 502 (Fla 3rd DCA 1977) 12a, 15a

Holmes v. School Board of Orange County, 301 So2d 145 (Fla 4th DCA 1974) 12a, 15a

JOA Corp. v. Lamerica Realty Co., 435 So2d 972 (Fla 3rd DCA 1983) 14a

Karl v. David Ritter, 164 So2d 23 (Fla 3rd DCA 1965) 12a, 15a

National Automobile Insurance Association v. Brumit, 98 So2d 330 (Fla 1957) 12a, 15a

Nasrallah v. State, 180 So2d 477 (Fla 3rd DCA 1965) 15a

Puleston v. Alderman, 4 So2d 704 (Fla 1941) 17a

Renna v. North Lauderdale, 430 So2d 945 (Fla 4th DCA 1983) 14a

Roberts v. Keystone Trucking Co., 259 So2d 171 (Fla 4th DCA 1972) 17a

Rupp v. Bryant, 417 So2d 658 (Fla 1982) 13a, 18a, 19a

Shipp v. City of Miami, 172 So2d 618, 172 So2d 618, 172 So2d 439 (Fla 1965) 13a, 18a

Tamiami Trail Tours, Inc. v. Cotton, 432 So2d 148 (Fla 1st DCA 1983) 12a, 15a

Texas Co. v. Town of Miami Springs, 44 So2d 808 (Fla 1950) 13a, 16a

Town of Largo v. Imperial Homes Co., 309 So2d 571 (Fla 2d DCA 1975) 11a, 13a, 14a, 16a, 17a

Trianon Park Condominium Association, Inc. v. City of Hialeah, No. 63,115 (Fla Apr 4, 1985) 11a, 13a, 14a, 18a, 19a, 20a

Rules

Fla R Civ P 1.190(b) 13a, 15a, 16a
Fla R App P 9.030(a)(2)(iv) 20a

STATEMENT OF THE CASE

This case began in the Twentieth Judicial Circuit, Lee County, Florida by an action being filed against Landahl, Brown & Weed Associates, Inc. (Landahl), *et al.*, for recovery of damages for unpaid construction work performed by the plaintiff on seven construction sites in the City of Cape Coral. Apx 1. Various cross and counter actions were filed, as well as a separate action filed by Landahl against the construction manager of the seven projects, which was consolidated with this action. Landahl also filed a third party action against the City of Cape Coral, and this is the subject of this appeal. Apx 3. Following a jury trial, a judgment was entered in favor of Landahl against the City in the amount of $266,254, Apx 35. The City did not file a motion for a new trial, but did file a motion for remittitur which was denied. Apx 35-36. Thereafter, the City filed a notice of appeal to the Second District court of Appeal. Landahl filed a cross appeal contending the trial court was in error in limiting Landahl's recovery to its out of pocket expenses. On May 8, 1985, the Second District reversed the trial court judgment, and on June 7, 1985, it denied the motion for rehearing filed by Landahl. Apx 61, 92. Landahl filed a notice to invoke the discretionary jurisdiction of this Court on July 8, 1985. Apx 93.

STATEMENT OF FACTS

The decision of the Second District Court of Appeal reads in pertinent part as follows:

> " . . The record we have is pitifully meager and the issues raised on this appeal do not really address the most glaring defects in appellee's attempts to state a viable cause of action against appellant . . . the principles of law that require this result are barely touched on in the brief or in the record below.

* * *

> . . . appellant filed a motion for judgment on the pleadings. It was at this point, if not before, that the trial judge should have entered judgment for appellant.
>
> It also appears that a motion to dismiss with prejudice should also earlier have been granted. However, we are not sure, because of the meager record, that the proper grounds were presented to the trial judge to support the motions. Apx 61.

The motion to dismiss and the motion for judgment on the pleadings of the City were based on the identical same grounds. Apx 17-22. The grounds of the motions, which were argued in writing (cf. Apx 16), were that since Landahl and the initial plaintiff had settled between themselves the trial court lost jurisdiction over the action. The City also contended at this point, which was just prior to trial in a 9 year old action, that the recovery of Landahl, if any, should be limited to the amount of the claim of the initial plaintiff. From its first pleading, 9 years earlier, Landahl had demanded $10,000,000 in damages.

On appeal, the City raised three issues: (1) whether it was improperly joined in the action, (2) whether the Court lost jurisdiction after Landahl settled with the initial plaintiff, and (3) whether the Landahl judgment should have been limited to the amount of the claim of the initial plaintiff. Apx 39.

The Second District did not deal with any of the issues raised by the City either on appeal or in the trial court, and made its ruling upon a barren record for the issues decided. Its ruling was:

> ". . . there is no cause of action for the manner in which a municipality exercises it governmental function of issuing or refusing to issue permits.

> *Trianon Park Condominium Association, Inc.* v. *City of Hialeah,* No. 63,115 (Fla. Apr 4 1985) (10 FLW 210) . . . That is not to say, however, that a party does not have a right to relief from the wrongful refusal or revocation of a building permit. That cause of action is limited though to an action to acquire or retain the permit on the grounds of equitable estoppel. *Town of Largo* v. *Imperial Homes Corp.,* 309 So2d 571 (Fla 2d DCA 1975).

Landahl filed a motion for rehearing pointing out that the record on these issues was incomplete and misleading, and that the first count of Landahl's pleading contained the title, "Equitable Estoppel", requesting relief under the *Town of Largo* case and requesting that the City be enjoined and ordered to reissue the permits. Apx 3-10, 68-69. Landahl's motion for rehearing was denied. Apx 92.

There was no dispute between the parties on the factual issues, and hence, they were not addressed in the Second District. Succinctly stated, Landahl obtained building permits from the City to construct seven high rise residential buildings, expended in excess of $250,000 in out of pocket expenses and had undertaken construction on each of the seven buildings pursuant to the permits when a police officer of the City, allegedly acting as City Manager while the City Manager was out of town for the day, visited each of the building sites and posted notices that construction was to stop. No definite written reason was given for stopping construction, but it was apparent to all concerned that the action was taken in response to substantial public sentiment against the high rise construction. Section 103.2 of the City Code provides that if construction is stopped for any reason the City must state the reason for stopping construction and designate the terms upon which construction may commence again. The City failed to comply with this Code provision and breached other Code provisions and terms of the permits in stopping the

construction. The decision to stop construction did not come from the City's zoning or permit department. See Apx 65-76, 82-91.

SUMMARY OF ARGUMENTS

The decision of the Second District Court of Appeal expressly states that the record is incomplete and the basis of its decision was not raised or argued on appeal. This is in direct conflict with *Applegate* v. *Barnett Bank of Tallahassee,* 377 So2d 1150 (Fla 1980) that the decision and proceedings of the trial court are presumed correct and the burden is on the appellant (City) to demonstrate error. The decision of the Second District held that Landahl's pleadings did not state a cause of action against the City on the theory of equitable estoppel and that the facts presented on appeal did not establish a cause of action for municipal tort liability. The City did not raise these issues in the trial court or on appeal, and specifically agreed to the trial of the case on the theory of the City having an obligation, in the nature of contract obligations, to comply with the terms and conditions of the building permits and the code and regulations under which the permits were issued. Thus, the Second District decision is in direct and express conflict with *Commodore Plaza at Century 21, etc.* v. *Cohen,* 350 So2d 502 (Fla 3rd DCA 1977); *Tamiami Trail Tours, Inc.* v. *Cotton,* 432 So2d 148 (Fla 1st DCA 1983), as the City did not object or allege any error concerning equitable estoppel, and *National Automobile Insurance Association* v. *Brumit,* 98 So2d 330 (Fla 1957); *Holmes* v. *School Board of Orange County,* 301 So2d 145 (Fla 4th DCA 1974); *Karl* v. *David Ritter,* 164 So2d 23 (Fla 3rd DCA 1964), as the City acquiesced in the factual theory of the trial of the case and the jury instructions. The Second District held Landahl did not state a cause of action for equitable estoppel, but the Landahl pleading (Apx 3) contains all of the essential elements of such an action as established in *Town of Largo* v. *Imperial*

Home Corp., 309 So2d 571 (Fla 2d DCA 1975); *Texas Co.* v. *Town of Miami Springs*, 44 So2d 808 (Fla 1950). If this issue had been raised in the trial court, Landahl could have corrected his pleadings, if such were needed, and in any event the City tried the case without any objection on this ground. See Rule 1.190(b), Fla R Civ P. The decision of the Second District is in express and direct conflict with the *Town of Largo* and *Town of Miami* cases. The Second District also held that the stopping of proper construction under valid building permits, without any reasons being given, and in violation of the City's Code and regulations was a "discretionary" function and not subject to municipal tort liability, citing *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, No. 673,115 (Fla Apr 4, 1985). This Second District decision is in direct and express conflict with the *Trianon Park* case, as that case expressly states that non-policy decision making is not a discretionary function of government, but is non-discretionary and administrative in nature, for which tort liability may attach. Also, the Second District decision is in direct and express conflict with *Rupp* v. *Bryant*, 417 So2d 658 (Fla 1982) which held that if there is an existing regulation or code provision requiring governmental acts to be performed in a particular manner, the performance of the act in accordance with the regulation or code is administrative and not discretionary, and tort liability may attach. In stopping Landahl's construction, the City breached its own Code and regulations on the procedure for stopping construction and breached the terms and conditions of the building permits. The City agreed to this theory of the case. Apx 34. Further the Second District decision is in conflict with the *Trianon Park* case and the line of cases such as *City of Miami* v. *Albro*, 120 So2d 23 (Fla 3rd DCA 1960) and *Shipp* v. *City of Miami*, 172 So2d 618, cert dismd 172 So2d 439 (Fla 1965) which hold that a municipality may be liable in tort for wrongful and negligent acts of its police officers in enforcing the law.

In the present case, it was a police officer of the City, without any authority from the building permit or zoning department of the City who ordered Landahl to stop construction.

ARGUMENT I

The decision of the Second District expressly states that the "record we have is pitifully meager and the issues raised on this appeal do not really address" the principles of law upon which the trial court judgment is reversed. The Second District incorrectly relied upon an incomplete record in conflict with *Applegate* v. *Barnett Bank of Tallahassee*, 377 So2d 1150 (Fla 1980); *JOA Corp.* v. *Lamerica Realty Co.*, 435 So2d 972 (Fla 3rd DCA 1983); *Renna* v. *North Lauderdale*, 430 So2d 945 (Fla 4th DCA 1983). The Second District reversed the trial court decision on the ground that Landahl could not recover from the City for refusing to permit Landahl to engage in construction in accordance with a valid building permit issued to it and in reliance upon which Landahl expended over $250,000 in out of pocket expenses. The Second District relied upon *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, No. 63,115 (Fla Apr 4, 1985) in holding that Landahl had no cause of action and relied upon *Town of Largo* v. *Imperial Homes Corp.*, 309 So2d 571 (Fla 2d DCA 1975) to hold that the Landahl pleading failed to state a cause of action.

In relying upon the incomplete record, the Second District incorrectly relied upon misleading facts and procedures. The Second District was not aware that the *Trianon Park* case theory was not, by agreement of the City, the theory of the cause of action in the trial court, which is why the City did not raise the issue on appeal or provide an appeal record informative on the issue. If the appeal record had been complete, it would have been clear that the *Trianon Park* case was not applicable to the facts of the case against the City. Also, neither the appeal record

nor the argument of the parties were informative on equitable estoppel, and if the record had been complete, it would have shown that the pleading did state a cause of action for equitable estoppel and that the necessary facts were proved at trial. See Fla R Civ P 1.190(b). The record would further have shown the City waived any right to object and acquiesced in the trial procedures, pleadings, and facts on these issues, and agreed to the applicable law for the facts of the case. See Apx 34.

ARGUMENT II

The decision of the Second District is in express and direct conflict with the line of cases that hold that issues not raised in the appellate court by the appellant are waived and abandoned. *National Automobile Insurance Association* v. *Brumit,* 98 So2d 330 (Fla 1957). The decision is also in conflict with the related rule that a party may not assert as trial court error actions to which he has not objected, *Commodore Plaza at century 21, etc.* v. *Cohen,* 350 So2d 502 (Fla 3rd DCA 1977); *Tamiami Trail Tours, Inc.* v. *Cotton,* 432 So2d 148 (Fla 1st DCA 1983), or in which he has acquiesced, *Holmes* v. *School Board of Orange county, 301 So2d 145 (Fla 4th DCA 1974); Karl* v. *David Ritter,* 164 So2d 23 (Fla 3rd DCA 1964). Also, objections made in the trial court which are not argued on appeal are abandoned. *Nasrallah* v. *State,* 180 So2d 477 (Fla 3rd DCA 1965). Compare the City's designation of judicial acts to be reviewed (Apx 37) with the errors argued by the City on appeal (Apx 39).

The Second District reversed on the round that Landahl had not stated a cause of action against the City for equitable estoppel and could not recover on the theory of municipal tort liability, but the City did not object, agreed and acquiesced in the cause of action theory as far as equitable estoppel was concerned and consented to the trial of the case on the theory that the City was obligated to comply with the terms and conditions of the building per-

mits and the code and regulations under which the permits were issued. See agreed jury instruction at Apx 34. In *Town of Largo* v. *Imperial Homes Corp.*, 309 So2d 571 (Fla 2d DCA 1975) it was stated that "A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deed . . ." at 309 So2d 573. The Second District decision is in direct and express conflict with this language of the *Town of Largo* case. Also, issues not raised by the pleadings in the trial court, but which are tried without objection and or by acquiescense or consent shall be treated in all respects as if they had been raised in the pleadings. Fla R Civ P 1.190(b). The record on appeal was not intended or designed for dealing with the issues raised *sua sponte* by the Second District. Landahl would respectfully submit that it did not have a fair opportunity to defend or argue against these issues raised by the Second District in surprise to Landahl. Please see Landahl's arguments at Apx 65, 82. See the appeal issues raised by the City at Apx 39.

ARGUMENT III

The decision of the Second District is in express and direct conflict with *Town of Largo* v. *Imperial Home Corp.*, 309 So2d 571 (Fla 2d DCA 175). See also *Bregar* v. *Britton*, 75 So2d 753 (Fla 19540; *Texas Co.* v. *Town of Miami Springs*, 44 So2d 808 (Fla 1950). In the *Town of Largo* case the Court held that "A citizen is entitled to rely on the assurances and commitments of a zoning authority is bound by its representations, whether they be in the form of words or deeds. . . ." 309 So2d at 573. Although the decision upheld an injunction against the municipality, the language of the decision does not restrict in any way the right to recover money damages against a municipality.

The first count of the Landahl pleading against the City was entitled "EQUITABLE ESTOPPEL" and alleges that

Landahl purchased the properties in reliance on the existing zoning and obtained building permits from the City, and thereafter, "expended in excess of $250,000 in reliance on the building permits." The pleading further alleges that the City knew that Landahl was relying on existing zoning and permits, but without proper cause and in violation of its own Code ordered Landahl to stop construction under the permits. Apx 3-10. These facts meet the cause of action guidelines of the *Town of Largo* case. Landahl proved at a trial each of the elements set forth in the case of *Town of Largo*, and related cases, and the City consented at the trial to the jury instruction on the point. Apx 34. The City consented to a jury instruction on damages, as it preferred to pay a money damage rather than permit the high rise construction of Landahl. Landahl, as late as the week before trial, offered to settle on the basis of the *Town of Largo* theory that Landahl was entitled to the benefit of the permits, but in view of the problems with the City, at the time of trial took the position that either a money judgment or the permits was acceptable, and the parties agreed to a money damage jury instruction a to the City. See Apx 34. The surprise and confusion of the Second District decision, along with the 10 day time limitation to file a motion for rehearing on entirely new issues, prevented Landahl for adequately presenting this matter to the Second District. Please see Apx 65,82. In addition, since the City did not object or raise this equitable estoppel issue in the trial court or on appeal, the Second District decision is in direct and express conflict with the rule that Landahl should have been permitted to amend its pleading to correct any defect in the allegations for a cause of action, especially after the case was 9 years old and the issue had never previously been raised. See *Roberts* v. *Keystone Trucking Company*, 259 So2d 171 (Fla 4th DCA 1972) and *Puleston* v. *Alderman*, 4 So2d 704 (Fla 1941).

ARGUMENT IV

The decision of the Second District is in express and direct conflict with *Trianon Park Condominium Association, Inc.* v.*City of Hialeah*, No. 63,115 (Fla Apr 4, 1985), and with *Rupp* v. *Bryant*, 417 So2d 658 (Fla 1982), as well as the line of cases such as *City of Miami* v. *Albro*, 120 So2d 23 (Fla 3rd DCA 1960) *Shipp* v. *City of Miami*, 172 So2d 618, cert dismd 172 So2d 439 (Fla 1965).

The Second District cited the *Trianon Park* case and stated that Landahl was not entitled to recover from the City for the refusal of the City to permit Landahl to continue construction in accordance with the terms of the building permits and for stopping construction in violation of the terms of its Code and regulations for stopping construction began under building permits it has issued. The factual situation, not in the record on appeal as the parties did not consider the appeal to be dealing with any factual matters, is that a police officer for the City visited each of the Landahl building sites and posted notices that construction was to stop. The authority for this action did not come from the City's zoning or building department. On the date this took place the Mayor of the City was out of town for the day, and the police officer acted in response to pressure from local citizen groups that did not want high rise units built in the City. Thereafter, the City administrators, though denying they participated in the stopping of construction, took no action to rescind the police officer's action, but did offer to permit Landahl the option to build out on "the point" where there was already a high rise building. In stopping the construction, the City violated its own Code provision for stopping construction. See Section 103.2, City of Cape Coral Building Code, Trial Exhibit 4. That section requires that if the City stops construction, it must state in writing the reasons therefore and the terms upon which construction may commence

again. Landahl was never told of the specific reasons for stopping construction, except citizen pressure, and no terms were ever given upon which construction commence again. The City's position continued through the trial of this action some 9 years later. See Count I of Landahl's pleading (Apx 3) where equitable estoppel relief was demanded and an injunction requested for enforcement of the permit rights (Apx 8), and then compare the jury instruction agreed to by the City (Apx 34). As to the reasons for stopping construction, see the City's pre-trial statement at Apx 11.

The *Trianon Park* case holds that a municipality is not liable in tort for the manner in which it exercises its "discretionary" powers, but is subject to tort rules of liability for acts that do not rise to the level of decision-making, but which are nondiscretionary or administrative in nature at the operational level. The City's police officer stopping Landahl's construction under properly issued valid permits was an operational level administrative act described in the *Trianon Park* case. The decision to "issue" a permit may be a "discretionary" act, but the stopping of construction under a valid permit and in violation of the City's Code and regulations is not. *Trianon Park, supra.* Also, the stopping of construction under a validly issued building permit is to be distinguished from zoning issues. Zoning is a policy decision making function at the executive hearing level, but building permits are issued, without hearing, by administrative-operation level employees following laws and regulations enacted by the City. The case of *Rupp* v. *Bryant, supra,* held that if there is an existing regulation or code provision requiring or directing the governmental act to be performed in a particular manner, the manner in which the act is performed loses all indicia of any discretionary characteristic, and the tort liability rules apply. The City violated its own Code and regulations in stopping Landahl's construction, and under the *Rupp* case the tort rules of liability apply.

Also, the stopping of construction by a police officer, who acts wrongfully or negligently, falls in the category of cases long recognized as imposing tort liability on municipalities. No logical distinction can be made between a police officer wrongfully seizing property or person and a police officer who wrongfully seizes the property right in building permits to engage in lawful construction. *City of Miami* v. *Albro, supra; Shipp* v. *City of Miami, supra; Trianon Park, supre,* on general principles, but also at p 13.

CONCLUSION

It is respectfully requested that this Court accept discretionary jurisdiction pursuant to Fla R App P 9.030(a)(2)(A)(iv).

No. 85-1499

Supreme Court, U.S.
FILED
MAY [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Petitioner

v.

CITY OF CAPE CORAL
Respondent

WRIT OF PETITION OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD DEV. BUNN
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
(703) 684-2500

Attorney for Petitioner

REPLY ARGUMENT

The City of Cape Coral misleads the Court with its argument that the writ of certiorari should not issue because petitioner did not raise the Federal issues in the Florida appellate courts and they were not tried in the Florida trial court, although they were alleged in the complaint.

LIST OF PARTIES AND AFFILIATES

A list of all parties to this proceeding are contained in the caption.

Landahl, Brown & Weed Associates, Inc. is not and has no parent subsidiary or affiliated company or organization.

TABLE OF CONTENTS

Page

Reply Argument 1
List of Parties and Affiliates 1
Table of Authorities 2
Argument 3

TABLE OF AUTHORITIES

Cases

Blonder-Tongue Labs. v. University Foundations,
402 U.S. 313 (1971) 6
Capitol Cities Cable, Inc. v. Crisp, 467 U.S. _____ (1984) 6
Maxcy-Baton Organ Co. v. Glen Bldg. Corp.,
355 Ill. 228, 189 N.E. 326 (1934) 6
Pollard v. United States, 352 U.S. 354 (1957) 6
Rothschild v. Knight, 184 U.S. 573 (1901) 6
Trianon Park Condominium Asso., Inc. v.
City of Hialeah, No. 63,115 (Fla. April 4, 1985) 4,5
Youakim v. Miller, 425 U.S. 231 (1967) 6

Rules

Florida Rules of Civil Procedure
Rule 9.120(d) 5
Rule 9.210(a)(5) 6

ARGUMENT

As the City[1] conceded, the issues raised here by Landahl[2] were alle d in the complaint filed in the trial court. The City is incorrect in stating that the issues were not tried in the Florida trial court. The Federal issues and the right to the recovery of money damages were specifically tried in the trial court. The City raised the following grounds by motion to dismiss the complaint on two separate occasions in the trial court:

> 2. That the court abate this action for lack of jurisdiction of subject matter because the alleged acts are judicial, quasi-judicial, legislative or quasi-legislative in nature and are immune under the doctrine of sovereign immunity.
>
> 3. That the court dismiss the third party plaintiff's complaint Count III, IV, V, VI and VII for failure to state a cause of action upon which relief may be granted.
>
> * * *
>
> 5. The that court dismiss Count II in that it contains no allegations of ultimate fact and that it contains three separate causes of action, i.e., denial of due process, taking of property without just compensation, and interference with the right to contract.
>
> * * *
>
> 7. That the court dismiss Count IV in that a municipality is not a person and cannot be guilty of violating the federal law listed in the allegation.
>
> 8 That the court dismiss Count V in that the conduct described is beyond the scope of the office and that the municipality has immunity.

---

1. "City" as used herein refers to the "City of Cape Coral", respondent.

2. "Landahl" as used herein refers to "Landahl, Brown & Weed Associates, Inc.", petitioner.

On each occasion, the trial court considered and denied these grounds to dismiss the case. The first motion was denied on February 2, 1978 and the second motion on the same grounds was denied by a new judge in the case November 11, 1981.

After consideration by the trial court of the issues raised in this Court, the case went to trial with jury instructions that Landahl was entitled to recover money damages, if the jury should find that the City wrongfully prevented Landahl from engaging in construction in accordance with the building permits previously issued to it by the City under the old building code.

The jury returned a verdict of money damages against the City and in favor of Landahl, and the City appealed to the Second District Court of Appeal of Florida.

It is important to note that Landahl would not have raised the Federal issues on appeal as it was successful below, and was only concerned with defending the issues raised by the City on appeal. Furthermore, the City did not raise the Federal issue or the recovery of money damages, but instead appealed only on procedural grounds centered essentially around the right of Landahl to recover based upon a third party action, rather than via an original complaint. The City obviously was convinced by Landahl's agruments that it was entitled to recover money damages on constitutional grounds.

The Second District Court of Appeals of Florida raised, *sua sponte,* the right of Landahl to recover money damages. Landahl was not given notice of or an opportunity to brief or argue the issues raised, *supa sponte*, by the Second District appeal court, prior to the ruling. Landahl was caught totally by suprise. The issue raised, *sua sponte*, and ruled upon by the Court was that there was no right to recover money damages for revocation of building permits in any situation. The ruling was based upon a yet unpublished opinion decided, one month earlier, on April 4, 1985, by the Florida Supreme Court. *Trianon Park Condominium Asso., Inc.* v. *City of Hialeah*, No. 63,115 (Fla. April 4, 1985). The Landahl decision was rendered May 8, 1985. More than one-half of the 15 days allowed for a motion for rehearing

was expended by Landahl attempting to obtain a copy of the *Trianon Park* case. Six days alone were utilized by mail in transit—three days for the Landahl decision to be received and three days for a copy of the *Trianon Park* case to be received. The short remaining time was consumed with research of the new law under the *Trianon Park* decision and with research on related and associated cases. Certainly, if Landahl was to have any chance of success in its motion for reconsideration, it perforce was required to meet head-on the basis of the ruling of the Second District. Landahl did not have the luxury of choosing issues, but was required to meet the issues selected by the Second District. It would have been precious folly for Landahl to have skirted the *sua sponte* issues of the Second District, or to assert new issues foreign at that point to the case, in the motion for rehearing. The *Trianon Park* case does not deal with the Federal issues raised in this Court.

Landahl did file an appeal to the Florida Supreme Court. However, the jurisdiction of that Court is entirely discretionary and the procedure is that jurisdiction is decided before any issue on the merits is raised. It is misleading for the City to argue that Landahl did not raise the Federal issues in the Florida Supreme Court that have been raised in this Court, as Landahl never got beyond the jurisdictional point in the appeal. The Appendix to the City's Opposition Brief contains the Landahl Brief on Jurisdiction filed with the Florida Supreme Court, and the City utilizes that Brief incorrectly to suggest that the Federal issues should have been, but were not, raised below. The Florida Supreme Court by a two to one vote declined to accept jurisdiction. Landahl was required to get past the jurisdictional issue before it could raise the issues on the merits. The Landahl brief filed with the Florida Supreme Court was only a jurisdictional brief, and had absolutely nothing to do with the merits of the case or the issues to be raised on appeal. The Florida Rules of Appellate Procedure, Rule 9.120(d), provides:

> Petitioner's brief, limited solely to the issue of the Supreme Court's jurisdiction...shall be served within 10 days of the filing of the notice...

Rule 9.210(a)(5), Florida Rules of Appellate Procedure, provides that "Briefs on jurisdiction shall not exceed 10 pages." The 10 days and 10 pages point out the limited nature of the jurisdictional brief and the issues to be raised.

The applicable rule is that where the successful party in the trial court is defeated in the intermediate appellate level the higher appellate court may hear the appeal and rule on issues not raised in the intermediate appellate level, as the victorious party in the trial court had no opportunity to raise the issues at the intermediate appeal level. See *Maxcy-Barton Organ Co.* v. *Glen Bldg. Corp.*, 355 Ill. 228, 189 N.E. 326 (1934); cf. *Rothschild* v. *Knight*, 184 U.S. 573 (1901). Landahl, being victorious in the trial court, and having never passed the jurisdictional discretionary test in the Florida Supreme Court, had no opportunity to raise, after the trial court, the Federal issues.

This Court has recently recognized the historical flexibility of the Court in favor of deciding relevant issues raised in this Court where the objection is asserted that the issues were not, under various circumstances, raised below. *Capital Cities Cable, Inc,* v. *Crisp*, 467 U.S. _____ (April 16, 1984). See *Youakim* v. *Miller*, 425 U.S. 231 (1967); *Blonder-Tongue Labs.* v. *University Foundation*, 402 U.S. 313 (1971); *Pollard* v. *United States*, 352 U.S. 354 (1957).

The issues raised by Landahl in this Court were properly and adequately raised below. The argument of the City to the contrary is misleading and incorrect. It is submitted that Landahl did not have the "real" opportunity nor the requirement to raise different issues at the intermediate appellate levels.

Edward DeV. Bunn
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
703-684-2500
Attorney for Petitioner